BLANK

PAGE

Office-Supreme Court, U.S.
FILED
MAR 4 1966
JOHN F. DAVIS, CLERK

No. 1093

Supreme Court of the United States

OCTOBER TERM, 1965

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

JOHN H. SCHAFER
ARMAND DERFNER
701 Union Trust Building
Washington, D. C. 20005

Of Counsel:

COVINGTON & BURLING

BLANK

PAGE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

LEE E. A. PARKER, *Petitioner,*

v.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Oregon in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the post-conviction trial court (Circuit Court of Multnomah County), unreported, is printed in Appendix A, *infra,* p. 1a. The opinion of the Supreme Court of Oregon — Ore. —, 407 P. 2d 246 (1965), is printed in Appendix B, *infra,* p. 7a.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on November 3, 1965. A timely petition for rehearing was denied on December 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Where the bailiff in charge of the jury during defendant's murder trial told jurors "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," did defendant's conviction and sentence to life imprisonment violate due process?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is Amendment 14, Section 1 of the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner seeks review of a decision of the Supreme Court of Oregon which denied post-conviction relief under a statute directing such relief when there has been a "substantial denial . . . . of petitioner's rights

under the Constitution of the United States."* The decision of the Supreme Court of Oregon reversed a decision of the Circuit Court of Multnomah County, which had granted a new trial because of its finding of fact (accepted by the Supreme Court of Oregon) that the bailiff in charge of the jury made statements to members of the jury to the effect that: "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it."

Petitioner Lee Parker was convicted of second-degree murder on May 18, 1961, and sentenced to life imprisonment. *Affirmed,* 235 Ore. 366, 384 P. 2d 986 (1963).** Petitioner then filed a petition for post-conviction hearing and relief, alleging, among other things, that he had been denied a fair trial in accordance with due process of law by the misconduct of the bailiff in "discussing the case directly with the jurors," and "passing on the guilt of the petitioner to the jurors during trial." (Amended Petition for Post-Conviction Hearing and Relief, Para. VII.) After a hearing, the Circuit Court of Multnomah County found

---

* O.R.S. § 138.530(1)(a):

"(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

"(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

** This was petitioner's second trial. His first conviction, in 1958, had been reversed by the Supreme Court of Oregon on grounds unrelated to the present petition. 225 Ore. 88, 356 P.2d 88 (1960).

as a fact that the bailiff had made the statements quoted above. Noting that the trial had lasted eight days, during which there was opportunity for close association between the jurors and the bailiffs assigned to the trial, and that the jury had deliberated twenty-six hours, the court held "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." The court accordingly ordered a new trial for the defendant.

The State appealed to the Supreme Court of Oregon, which accepted the facts as found by the post-conviction trial court, but held that these facts did not result in denying petitioner a "constitutionally fair trial."

The federal question involved in this case arises by the terms of the statute under which petitioner proceeded, O.R.S. § 138.530, which directs relief where federal constitutional rights have been denied. The decision of the Supreme Court of Oregon necessarily passed on this federal question, as indicated by that court's statement of the question to be decided:

> "The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon," [— Ore. —, 407 P. 2d at 248 (1965).]

REASON FOR GRANTING THE WRIT

The decision of the Court below is in square conflict with a decision of this Court rendered last year: *Turner* v. *Louisiana,* 379 U.S. 466 (1965).

In *Turner,* this Court held that where a trial jury was in the charge of deputy sheriffs who were witnesses for the prosecution, the defendant was denied

his constitutional right to a fair trial by an impartial jury. This Court did not demand proof that the deputies had talked to the jurors about the case, but held flatly that,

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." [379 U.S. at 472-73.]

In the instant case, the Supreme Court of Oregon consigned this basic principle to oblivion with these words:

> "Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough, imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict. The only exception to such finality is if the imperfection is so apparent and blatant that granting finality would 'violate the plainest principles of justice.' *McDonald* v. *Pless,* supra, 238 U.S. at 269." [— Ore. —, 407 P. 2d at 250.]

It is true that in many ways the law does not ask how the jury reached its verdict. But this confidence is based on an assumption that the jury can operate in the ideal manner *because* all possible steps are taken to eliminate, wherever visible, "inside prejudices" and "outside influences." Thus we have challenges for cause to eliminate prejudiced jurors; we have reversals where Negroes have been systematically excluded or

where aroused community sentiment is likely to prejudice a jury; and most fundamental and unquestioned, we require seclusion of the jury during its deliberations.

No elaboration is required to see that "what happened in this case operated to subvert these basic guarantees of trial by jury." *Turner* v. *Louisiana,* 379 U.S. at 473. The bailiff, a court official, told jurors the defendant was guilty, and that a guilty verdict—even if erroneous—would be harmless, since it would be corrected by the Supreme Court.

The Supreme Court of Oregon sought to distinguish *Turner* v. *Louisiana* on the grounds that the degree of out-of-court influence in the two cases differed. But the facts in this case show that, if anything, reversal here should follow a fortiori from the decision in *Turner.* In *Turner,* three days' association between the jury and deputy sheriffs who were prosecution witnesses required reversal without more. Here, too, the association between the bailiff and jury had been close and prolonged and the issues were complex, requiring an eight-day trial. But in addition the jury here was sufficiently in doubt about its decision to require twenty-six hours to reach a verdict. And in this case the court found the bailiff had made damaging statements, whereas in *Turner* there was no indication whether the deputies had talked about the case to the jurors.

Petitioner suggests this is a particularly appropriate case for granting certiorari. (1) The issue is important. (2) The facts have been found, following a painstaking hearing under the procedures commendably afforded by the state. (3) The denial of due process is

plain. (4) The conflict with *Turner* v. *Louisiana* is clear. Petitioner would further suggest, indeed, that the issues are so plain that this case should be summarily reversed, without the necessity of further argument on the merits.

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the Supreme Court of Oregon reversed.

Respectfully submitted,

JOHN H. SCHAFER
ARMAND DERFNER
701 Union Trust Building
Washington, D. C. 20005

Of Counsel:

COVINGTON & BURLING

BLANK

PAGE

APPENDIX

BLANK

PAGE

APPENDIX A

Opinion of the Circuit Court, Multnomah County (Alfred T. Sulmonetti, J.)

No. 300-660

LEE E. A. PARKER

v.

C. T. GLADDEN, Warden of the Oregon State Penitentiary

This matter is before the Court upon a Petition for Post Conviction Hearing, based upon plaintiff's petition filed on April 24, 1964 and amended petition filed July 23, 1964. The case arises from a conviction of second degree murder in the case of State of Oregon v. Lee E. A. Parker, Multnomah County file C-36135.

The Court has considered the evidence as it relates to each issue raised by the plaintiff in his petition and amended petition and will consider in this opinion only those issues which were not disposed of by decision given by the Court during the trial. These issues are unauthorized communication to the jury by the bailiff and separation of the jury during the trial.

The Oregon Legislature, in connection with deliberations, custody and communications with juries, provided in ORS 17.305 as follows:

> "After hearing the charge, the jury . . . if they retire . . . must be kept together . . . under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their delibera-

tions or the verdict agreed on. Before any officer takes charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability."

The alleged unauthorized communications are that the bailiff assigned to the trial, stated to members of the jury during the progress of the trial, "Oh that wicked fellow, he is guilty;" "If you find him guilty and there is anything wrong, the Supreme Court will correct it;" and the passing of a note from a spectator in the courtroom to the bailiff who, while the jury was deliberating for the purpose of reaching its verdict, gave said note to the juror to whom it was addressed.

Unauthorized communications made by a bailiff to a jury have been the subject of a number of decisions by the Supreme Court of Oregon. The most recent criminal case dealing with this question is *State* v. *Kristich*, 226 Or 240. There the unauthorized communication occurred while the jury was taken to a restaurant for dinner. One of the jurors asked the bailiff "if it were necessary for them to reach a verdict," to which the bailiff replied ". . . that defendant had been tried once before and therefore it was necessary to arrive at a verdict." The Court, speaking through Justice Sloan, reviewed the numerous decisions in this area and aligned the state of Oregon with those jurisdictions which hold that prejudice will be presumed and a new trial ordered when it appears that the bailiff has improperly communicated with the jury.

In the case of *Carson* v. *Brauer*, 234 Or 333, decided May 29, 1963, unauthorized communications were made to the jury by the bailiff in charge. There the Court, in a civil case, took occasion to modify the Kristich case to the extent that prejudice will not be presumed by a mere showing that the bailiff had improperly communicated to the jury. The Court held that in such cases they should be "remanded to the trial court with instructions for it to deter-

mine what, if any, misconduct had occurred and whether such misconduct 'materially affected the substantial rights' of the defendant." The Court further stated that "unless the remarks actually prejudiced the plaintiff's case, the judgment should not have been vacated and a new trial should not have been ordered."

With respect to the charge that the jury was separated during the trial, the most recent decision by the Supreme Court of Oregon was decided March 25, 1964 in the case of *Downes* v. *Plank,* OAS Vol. 78, p 571. In this case the Court adhered to its earlier decision of *Nickelson* v. *Smith,* 15 Or 209, in holding that "separation of a jury during its deliberations is contrary to the express requirements of ORS 17.305, and, if objected to, constitutes reversible error," and further holding that the matter of setting aside a verdict and granting a new trial is within the sound discretion of the trial court. It is to be noted that while this was a civil case, the Court held in clear and precise language that the statutory requirements with respect to separation of jury should be strictly followed in order to preserve the purity of the verdict.

In the light of these decisions, the Court has reviewed the testimony and has reached the conclusion that the statements made by the bailiff to the effect that "Oh that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," violated the specific provisions of ORS 17.305. The Court having found from the evidence that these statements were made to members of the jury during the trial of the case, passes to a consideration as to whether this unauthorized communication and misconduct "materially affected the substantial rights of the defendant."

In a criminal case, the burden upon the jury is an awesome one, for its decision affects the freedom and in some cases the life of the defendant. Therefore, any unauthorized communication, especially by an officer of the Court, which

goes to the very heart of the jury's concern, namely the innocence or guilt of the defendant, may be the influencing statement which guides a juror to reach a decision.

In the instant case, the trial lasted eight days. There is evidence that during this period some of the jurors were taken to a movie; to Washington Park and for a walk on the waterfront. These events provided opportunity for close association between the jurors and bailiffs assigned to the trial, and under such circumstances the greatest of care should have been exercised to assure that no statement concerning the merits of the case should be made to them.

Concerning the allegation that an unauthorized note was passed to a juror during deliberation, the Court finds from the evidence that such fact did occur. The bailiff, Mr. Cormack, admitted the passing of the note and the juror admitted receiving it. The bailiff's testimony is to the effect that he first read the note which advised the juror that there was illness in his family. The juror, Mr. Kolibaba, testified that the note contained information about a birthday party. In the light of this evidence the question is raised—"what information did the note really contain?" It is a well settled rule in this state that any communication with the jury after the case is submitted to them and they have retired for the purpose of deliberating and reaching a verdict, shall be done in open court and in the presence of the parties. If we are to preserve and maintain public confidence in the administration of our courts and the integrity of jury trials which is the bulwark of our liberty, the juries deliberations and pronouncements must be kept pure and untainted, not only from all improper influences, but from the appearances thereof.

In *Oien* v. *Bourassa*, 221 Or 359, decided April 20, 1960, involving comments by a bailiff to jurors, Justice Paul Harris, speaking for the Court stated: "The sanctity of the jury and its freedom from outside influences must be

jealously guarded by the court. Contacts between court officers and jurors, except as authorized by law, are not to be countenanced." In the instant case, the record discloses that the jury deliberated approximately twenty-six hours before reaching its verdict. The language in the Kristich case is of particular significance in the instant case wherein the Court states: "The length of the deliberation alone is evidence of doubt in the minds of the jurors. Therefore, it is impossible for us to know to what extent they could have been persuaded by the inward thought of further long deliberation when a verdict was thought to be required."

The influence which unauthorized communications may exert upon the jury are too infinite and varied to be the subject of disproof and our Court in such cases has followed the only safe rule—that of granting a new trial. In the case of *Thomas* v. *Dad's Root Beer,* 225 Or 166, our Court held: "Under the circumstances, therefore, we cannot say that it is clear that the 'misconduct could not and did not influence the verdict.' (Citing cases)"

In dealing with the questions here presented, the problem facing this Court was succinctly stated in the case of *State* v. *Gardner,* 230 Or 569, where the Court, speaking through Justice O'Connell stated: "In each case the court must choose between two conflicting interests; on one hand the interest of the individual who claims that the misconduct deprived him of a fair trial, and on the other hand the interest of the public in protecting the verdict from attack."

The language in the Kristich case is of particular significance in the instant case—"In a felony case, particularly where the penalty, as here, can be of long duration, the greatest of care should be exercised to obtain a fair trial. The rule should be inviolate that the jury can consider only such evidence and instructions that it receives in the

courtroom. . . . When we are in doubt the issue should be resolved in favor of the accused."

The case which gives rise to the instant case was tried by one of the most able and experienced trial judges of our state and it is the considered judgment of this Court that if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial.

From a consideration of all of the evidence, the Court has reached the conclusion that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant.

It is, therefore, ordered that the defendant be granted a new trial.

APPENDIX B

Opinion of the Supreme Court of Oregon (In Banc)

PARKER, *Respondent*

v.

GLADDEN, *Appellant*

DENECKE, J.

The petitioner seeks post-conviction relief. He was convicted of second-degree murder in 1961 and his conviction was affirmed upon appeal by this court. In his petition for post-conviction relief he alleges misconduct upon the part of the jury and bailiff.[o] A hearing was had and the post-conviction trial court found misconduct, that such misconduct was prejudicial, and ordered a new trial. The warden appeals.

The post-conviction statute (ORS 138.550(2)) provides:

> "When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. * * *"[1]

Petitioner alleged that he could not have raised the issue of misconduct prior to this time. The trial court made no finding on this issue. We will assume for the purposes of this decision that the issue of misconduct could not reasonably have been raised upon appeal.[2]

---

[1] This only applies if petitioner was represented on appeal by counsel, which he was.

[2] We need not pass upon the possible conflict between the above-quoted statute and Faye v. Noia, 372 US 391, 83 S Ct 822, 9 L ed2d 837 (1963).

From the opinion of the trial court we believe it found that the following occurred: (1) During the trial, the bailiff stated to an alternate juror about the defendant, "Oh, that wicked fellow, he is guilty." This was overheard by a regular juror; (2) The bailiff told an unknown juror during the course of the trial, "If there is anything wrong the Supreme Court will correct it." This was overheard by two regular jurors; and (3) After deliberations had commenced, the bailiff handed a note to a juror from the juror's wife. The note either pertained to the juror's birthday or informed him of his wife's illness or accident. These findings were largely based upon the testimony of certain jurors which was adduced at the post-conviction hearing.

The trial court apparently was of the opinion that the merit of the post-conviction petition should be judged by the same criteria as that statutorily fixed for judging a motion for new trial. It concluded "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." (The latter is the test established for the granting of a new trial. ORS 17.610.)

The trial court apparently did not consider whether the conduct constituted a ground for relief as stated in the post-conviction statute.

The grounds for post-conviction relief are limited. Error at the trial, even though it be considered reversible, prejudicial or materially affecting the rights of the party, is not necessarily a sufficient basis upon which to grant post-conviction relief. Post-conviction is not a delayed appeal. The basic purpose of the Act was not to enlarge the grounds for post-conviction relief; it was to end the confusion over which of the common-law writs was the proper vehicle to seek relief by providing a single exclusive remedy. *Brooks v. Gladden,* 226 Or 191, 195, 358 P2d 1055, cert den 366

US 974, 81 S Ct 1942, 6 L ed2d 1263 (1961); *Strong* v. *Gladden,* 225 Or 345, 348, 358 P2d 520 (1961); Collins and Neil, *The Oregon Postconviction-Hearing Act,* 39 Or L Rev 337 (1960).

ORS 138.530 provides that post-conviction relief shall be granted only when one or more of the following grounds is established:

> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.
>
> "(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
>
> [(c) and (d) have no application here.]
>
> "(2) * * * where such relief would have been available prior to May 26, 1959 [the effective date of the act], under the writ of habeas corpus * * *."

The question we have is whether the bailiff's conduct, found by the trial court to be error and prejudicial to the petitioner's cause, amounts to a substantial denial of petitioner's rights under the Constitutions of the United States or Oregon.[3]

In *Brooks* v. *Gladden,* supra, we observed that in this state a party has an absolute right to have the jury polled. However, we then went on to hold that a deprivation of such right is not a substantial denial of a constitutional right.

That the indictment does not state facts constituting a crime can be asserted as error for the first time upon

---

[3] The bailiff's statement that the defendant was guilty is the most flagrant error and it will not be necessary to treat the other two grounds.

appeal. *State* v. *Goesser*, 203 Or 315, 280 P2d 354 (1955). Nevertheless, we have held that the failure of the indictment to state facts sufficient to constitute a crime is not a ground for post-conviction relief. *State* v. *Cloran*, 233 Or 400, 414, 374 P2d 748, 377 P2d 911, 378 P2d 961, 98 ALR2d 732 (1963).

Other courts have likewise held that mere reversible error is not grounds for post-conviction relief. *United States ex rel Tisi* v. *Tod*, 264 US 131, 44 S Ct 260, 68 L ed 590 (1924), was a federal habeas corpus appeal. Mr. Justice Brandeis for the Court stated, "Under these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." (264 US at 134)

Sunal v. *Large*, 332 US 174, 67 S Ct 1588, 91 L ed 1982 (1947), was likewise a federal habeas corpus appeal. The petitioner was convicted of violating the Selective Service Act by not reporting for induction. At the trial he offered evidence to show that his selective service classification was invalid. Proving this would have been a complete defense. The trial court held such evidence to be inadmissible. This was thought to be the law at the time; however, the United States Supreme Court had not passed upon the issue. The petitioner took no appeal. Subsequently, in another case, the Supreme Court decided that trial courts should determine whether defendants' draft classification was correct.

The majority, speaking through Mr. Justice Douglas, held that the petitioner Sunal should have appealed and had no right to habeas corpus. The Court stated:

> "An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received through-

> out an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. * * *'' (332 US at 182)

Turner v. *State of Louisiana*, 379 US 466, 85 S Ct 546, 13 L ed2d 424 (1965), concerned the constitutional effect of misconduct in caring for the jury. This was heard upon certiorari to the state supreme court. The defendant was convicted of murder. The chief deputy sheriff and another deputy were principal witnesses for the prosecution. They testified that the defendant led them to the clip from the murder pistol and made a confession to them. The voluntariness of the confession was an issue and these deputies were crucial witnesses upon this issue. In accordance with Louisiana law, the jury was placed in charge of the sheriff. In fulfillment of this duty these two deputies ''were in close and continual association with the jurors'' for the three days of the trial. The court stated:

> ''It is true that at the time they testified in open court Rispone and Simmons [the two deputies] told the trial judge that they had not talked to the jurors about the case itself. But there is nothing to show what the two deputies discussed in their conversations with the jurors thereafter. * * * We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial—an association which gave these witnesses an opportunity, as Simmons put it, to renew old friendships and make new acquaintances among the members of the jury.'' (85 S Ct at 550)

The Court reversed, holding that the conduct of the trial violated the Fourteenth Amendment.

> ''In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the

> defendant's right of confrontation, or cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. * * *" (85 S Ct at 550)

In a broad sense the cases are similar. In the *Turner* case, the jury was exposed to out-of-courtroom influence in the form of constant association with the two key witnesses. In this case one regular juror was exposed to out-of-courtroom influence in the form of overhearing the bailiff express his opinion that the defendant was guilty. While there is the similarity, the difference in degree of the out-of-courtroom influence is so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial.

The problem here, as it is in civil litigation and in direct criminal appeals, is the balancing of the two desirable objectives,—giving finality to verdicts and protecting jurors from harassment, with another equally desirable objective, guaranteeing a constitutionally fair trial to an accused or any other party. *State* v. *Gardner*, 230 Or 569, 574, 575, 371 P2d 558 (1962).

We have frequently cited and quoted *McDonald* v. *Pless*, 238 US 264, 267-268, 35 S Ct 783, 59 L ed 1300 (1915), on the desirability of the first two above-stated objectives:

> "* * * But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harrassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private delibera-

tion, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

"• • • And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' *Cluggage* v. *Swan*, 4 Binn. 155 [5 Am. Dec. 400]; *Straker* v. *Graham*, 4 M. & W. 721."

Denying a convicted defendant the right to probe a jury verdict for vulnerability is not a denial of due process of law, *United States* v. *Provenzano*, 240 F Supp 393, 412 (D NJ 1965).

In *State* v. *Ausplund*, 86 Or 121, 135, 167 P2d 1019 (1917), the charge was abortion. After the trial, three jurors made affidavits that during deliberations one juror stated that during a recess a neighbor had told him that the defendant had performed abortions on previous occasions. The trial court refused to grant a new trial and upon direct appeal the conviction was affirmed. The decision of the court in effect was that such evidence would not even be received for the reason that it would destroy the finality of the jury's verdict.

In *State* v. *Ausplund*, supra, it was acknowledged that *Clyde Mattox* v. *United States*, 146 US 140, 13 S Ct 50, 36 L ed 917 (1892), was to the contrary. This court believed that decision was greatly limited by the later decision of *McDonald* v. *Pless*, supra. The *Mattox* case in any event

is not controlling here as it was a direct appeal from a federal court and only held that the lower court committed error, not constitutional error.

Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough, imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict. The only exception to such finality is if the imperfection is so apparent and blatant that granting finality would "violate the plainest principles of justice." *McDonald* v. *Pless*, supra, 238 US at 269.

We hold that one juror's overhearing of the bailiff's opinion that the defendant was guilty does not deprive the defendant of a constitutionally fair trial and, therefore, is not a ground for post-conviction relief.

Reversed.

BLANK

PAGE